



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Appeals Board finds:

1. The preliminary hearing Order should be affirmed.
2. The Board affirms the Judge's finding and conclusion that claimant sustained personal injury by accident arising out of and in the course of employment with respondent. The Board also affirms the Judge's finding and conclusion that claimant provided respondent with timely notice of the accident. Those conclusions are supported by claimant's testimony that he felt his back pop on August 16, 2000, while bending over taping plastic and that he immediately notified his supervisor, Richard Burke, of the incident and later spoke with Chris Stuber, whom claimant identified as respondent's owner.<sup>1</sup>

Claimant testified, in part:

Q. (Mr. Lee) Tell the Judge what happened.

A. (Claimant) I was -- we were getting ready to leave -- well, we was getting ready to leave for the day and we were in a utility room and they had some cabinets taped off with some plastic, the bottom of the cabinets didn't have a piece of tape on the bottom of the plastic and we was going to paint that room the next day, so it had to be taped, I pulled a piece of tape off and I leaned over and put the piece of tape on one end of the cabinet and come across, and felt something pop in my back, and I didn't think anything about it, you know, it was no big deal, I just thought, you know, it hurt, but, you know, I didn't think anything about it.

. . .

Q. What did you tell him [Mr. Burke]?

A. I told him, that kind of hurt, and, you know, it was -- I didn't think it was that big of a deal, so I went ahead and worked, we finished out the week.<sup>2</sup>

According to claimant, the back popping incident occurred on Wednesday and his back was stiff on both Thursday and Friday. On Saturday, claimant had difficulty getting out of bed because of his back and advised Mr. Burke of that fact. Claimant testified:

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<sup>1</sup> Claimant identified Mr. Stuber as respondent's owner. But Mr. Stuber identified himself as respondent's manager.

<sup>2</sup> Preliminary Hearing, October 26, 2000, pp. 5 - 7.

Q. (Mr. Lee) Tell the Judge what conversation you had with Mr. Burke on Saturday.

A. (Claimant) He told me that we probably weren't going to work, because he had picked up his son, and I told him that was great, because I couldn't get up out of bed.

Q. And did you tell him why you couldn't get out of bed?

A. I told him -- he said, did you hurt your back that bad? And I said, yeah, I hurt my back that bad on Wednesday, I didn't think it was that bad, but, you know, I can't get up out of bed today.<sup>3</sup>

Claimant's testimony is uncontroverted that he again spoke with Mr. Burke on Sunday and inferred that Mr. Burke was one of several individuals who talked him into going to the hospital emergency room later that night.

Claimant also testified that approximately two weeks after the August 16, 2000 incident, he spoke with Chris Stuber about medical treatment for his back. But, according to claimant, Mr. Stuber denied responsibility because claimant had failed to notify him of the incident within 24 hours.

Mr. Burke did not testify at the preliminary hearing and, therefore, claimant's testimony about his conversations with Mr. Burke is uncontroverted.

3. The Judge had the opportunity to observe both claimant and Mr. Stuber testify. The Judge must have found claimant credible as the Judge awarded claimant benefits despite Mr. Stuber's adverse testimony. In this instance, the Board gives some deference to the Judge's determination that claimant's testimony was credible and persuasive. Therefore, the Board also finds that claimant injured his back while working for respondent and that claimant immediately notified his supervisor of the incident.

4. Because claimant has proven that he injured his back while working for respondent and has proven that he provided respondent with timely notice of that accident, the request for benefits should be granted.

5. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>4</sup>

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<sup>3</sup> Preliminary Hearing, October 26, 2000, pp. 7, 8.

<sup>4</sup> K.S.A. 1999 Supp. 44-534a(a)(2).

**WHEREFORE**, the Appeals Board affirms the October 30, 2000 preliminary hearing Order entered by Judge Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2000.

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Ronald J. Laskowski, Topeka, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director